BRIEF FOR RESPONDENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 352

GENERAL MOTORS CORPORATION, *Petitioner*

v.

DISTRICT OF COLUMBIA, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Questions Presented*

In the view of respondent, the questions presented are:

Where the Congress acting under its plenary power over the District of Columbia provided, in the District of Columbia Income and Franchise Tax Act of 1947, for the imposition of a franchise tax upon corporations engaged in trade or business in the District of Columbia to be measured by "that portion of the net income of the corporation and unincorporated business as is fairly attributable to any trade or business carried on or engaged in within the District and such other net income as is derived from sources within the District," and where, pursuant to the act, the

*As stated by respondent in its Brief in Opposition to Petition for Writ of Certiorari.

Commissioners of the District adopted regulations containing a formula for the apportionment of the income of corporations engaged in the District and elsewhere in selling personal property on the basis of the ratio which such sales in the District by the corporation bear to its sales everywhere, and where this method of apportionment was applied by the District to General Motors Corporation, was not the United States Court of Appeals for the District of Columbia Circuit, sitting en banc, correct in holding:

1. That the apportionment formula prescribed in the Commissioners' regulations for apportioning net income, is a valid formula under the District of Columbia Income and Franchise Tax Act of 1947 and, as such, applicable to General Motors Corporation?

2. That the Commissioners' apportionment formula is not violative of or in conflict with the Constitution or decisions of this Court, and that its application to petitioner does not apportion to the District of Columbia net income in excess of that attributable to petitioner's activities within the District?

Counter-Statement of The Case

As will be evident by reference to the stipulations of fact and the majority opinion of the United States Court of Appeals for the District of Columbia Circuit on rehearing en banc (R. 260-436, 498-527), General Motors' statement of the case in its brief (pp. 4-9) contains only the barest outline of the nature and extent of its multi-faceted business operations within the District of Columbia. For this reason, respondent deems it essential to set forth the pertinent facts.

At the outset of their stipulation the parties stated that "Petitioner's [General Motors] methods of doing business and selling and distributing its products as described [in

the stipulation] are the same throughout the country." (R. 261.)

In addition to its central management staffs, General Motors is organized into a number of divisions, which are not separately incorporated, and which operate substantially independently of one another. The divisions are concerned with the manufacture, assembly, and/or sale of one or more of the Company's products. General Motors' principal business is the manufacture and sale of automobiles, trucks, other vehicles, parts and accessories. (R. 261.)

General Motors' Car Divisions consist of Pontiac Motor Division, Chevrolet Motor Division, Buick Motor Division, Oldsmobile Division, and Cadillac Motor Car Division, each of which, with the exception of Cadillac, has substantially identical operations throughout the country. (R. 262, 269, 268, 273.) The activities of these divisions, both within and without the District, are as follows:

For administrative purposes the country is divided into a number of "regions", each of which is subdivided into a number of "zones." (R. 261, 262.) With minor exceptions, each of the divisions sold its products only to authorized General Motors' dealers. (R. 284.) Dealer contracts contained explicit and detailed terms and conditions governing the responsibilities of the dealers. Typical of the dealer contracts was that used by Chevrolet (R. 307-331), the first paragraph of which states:

> "FIRST: Subject to the terms and conditions hereof, Chevrolet will sell and Dealer will buy Chevrolet motor vehicles and chassis with Dealer having the obligation to develop properly the sale thereof at retail particularly in the following area: * * *" (R. 310.)

A separate document, entitled "Terms and Conditions," was incorporated in and made a part of the selling agreement. Among its requirements were the following:

1. The dealer shall furnish Chevrolet every month an estimate of his requirements for the next three calendar months of new motor vehicles and chassis.

2. The dealer shall furnish every ten days a report showing retail sales of both new and used cars during that period, new and used car stocks, and unfilled orders on hand at the end of the period.

3. The dealer shall submit, on order forms supplied by Chevrolet, orders for Chevrolet's products for acceptance at mutually-satisfactory periods, and pay Chevrolet therefor the "dealer's price established by Chevrolet," and in effect at the time of shipment, plus a factory handling charge determined by Chevrolet, including reimbursement for any tax which Chevrolet paid, incurred or agreed to pay on such vehicles or chassis, on terms of cash, sight draft, or sight draft with bill of lading attached, plus collection charges. Dealers pay interest on all drafts from the dates specified thereon.

4. Chevrolet selects the distribution point and mode of transportation for vehicles shipped to a dealer, and prepays all charges including transportation charges. The dealer pays Chevrolet the distribution charges established by the division with the right reserved in Chevrolet to change its charges at any time. All claims for loss or damage to merchandise while in the custody of the transporter must be submitted by the dealer to Chevrolet within twenty days after date of delivery.

5. The dealer has the right to sell new parts and accessories, acquired by him at prices, terms and provisions established by Chevrolet, either directly from, or through a parts warehouse designated by Chevrolet.

6. The dealer must maintain a place of business satisfactory to Chevrolet as to appearance, location, and adequacy in size and layout, which place may not be moved,

nor a new or different location established, without prior written approval of Chevrolet.

7. The dealer must maintain his capital and net worth in the amounts and form specified by Chevrolet and, after negotiating with Chevrolet, revise such amounts to meet, within the negotiated time, changed conditions.

8. The dealer must maintain a uniform accounting system prescribed by Chevrolet; permit examination by Chevrolet's personnel of his accounts and records; provide satisfactory sales performance and service to owners in the dealer's operating area; maintain satisfactory sales performance in relation to competitive products, and in comparison with competitive Chevrolet dealers in the area; maintain an adequate staff of salesmen, and selling and customer relations organization; maintain complete, current records of sales and servicing of Chevrolet products; provide adequate customer complaint service, and maintain an adequate number and assortment of parts and accessories, and an adequate staff of mechanics for service.

9. Chevrolet may terminate the agreement for failure of the dealer to accord with any of the contract requirements and on other stated grounds, with detailed provisions concerning the effect of termination. Also contained are provisions concerning termination by the dealer. (R. 312-31.)

During the years 1957 and 1958, Pontiac Division had four dealers in the District, Oldsmobile had five, Buick had four, Chevrolet Motor Division had five, and Cadillac Motor Division had a distributor in the District who was also a retail dealer. (R. 268-69, 272-73.) The Chevrolet Division maintained a regional office in the District and a zone office in Baltimore, Maryland. (R. 270, 381.) Although the regional and zone offices of the remaining divisions were outside the District, zone offices in each case

were located within the Washington Metropolitan Area, from which offices the District activities of the divisions were conducted. As described in respect of the Chevrolet division, the operations of a regional office are as follows:

It is responsible for supervision of a number of zones, and has a regional manager, various department heads, and clerical assistants. Dealer orders for cars go directly to zone offices. The regional office receives from the zone offices periodic sales reports which it consolidates and forwards to the division's headquarters. When the supply of vehicles is short, the regional office receives statements from division headquarters of regional allotments of vehicles which it allots among the regional zones. They, in turn, allocate the vehicles among zone dealers. Attached to Chevrolet's regional office in the District was a fleet manager, responsible for contacting local and national fleet users, supplying to them information and promoting fleet orders for vehicles to be placed by such users with dealers. The fleet manager spent in these activities in the District approximately 40 per centum of his time. Fleet orders derive from large commercial users, municipalities and states. The fleet manager assists dealers in preparation of bids and specifications, and advises fleet users on types of equipment suiting their requirements. Chevrolet makes fleet sales directly to its dealers who, in turn, resell them to fleet users. (R. 270-71.)

Zone managers for the car divisions, Pontiac's being typical, carry out a number of activities connected with the division's commercial activities. The zone office was headed by a zone manager in charge of the overall office activity and the zone territory. His assistant spent approximately half of his time contacting zone dealers. His primary responsibility was supervision of district managers. The zone had a business management manager and a parts and services

manager, most of their time being spent visiting dealers. It also had an office manager in charge of car distribution, an assistant office manager, a claims administrator who, with an assistant, was responsible for warranty adjustments, and three service representatives whose full time was spent visiting the dealers' parts and service departments. A school instructor was responsible for the training school maintained by General Motors at Fairfax, Virginia. Four district managers spent their entire time visiting dealers. The office was also provided with the usual clerks, stenographers and similar personnel.

The zone manager and his assistant periodically visited dealers in the District of Columbia and elsewhere in the zone "(1) to work with the dealers concerning market opportunities, (2) to promote the sale of promotional literature, and (3) to maintain dealer interest in items that will help the retail sale of automobiles. The district managers are primarily responsible for the foregoing activities, but are supported by the zone manager, the assistant zone manager, and * * * the zone department heads." (R. 263.) The primary duty of the business management manager was "to assist Pontiac dealers within the zone territory in making their operations more profitable. This is done by the suggestion of ideas which strengthen dealer business. It is also his duty to analyze dealer business procedures and activities." (R. 263.)

The office manager and his assistant processed orders from dealers and called specific dealers in regard thereto.

The zone parts and service manager made recommendations to dealers concerning their service facilities, and promoted the best service possible for new and used automobiles. He also maintained a check on dealers' supplies of parts, made suggestions to them for promotional activities in the service field and, where necessary, recommended increases in a dealer's parts supply. The manager proc-

essed complaints from retail customers, and determined whether dealers satisfied customer warranty obligations.

The zone claims administrator, and his assistant, processed dealers' claims under General Motors' express warranties to dealers. These officials also processed complaints from retail customers. The three zone office service representatives functioned in a manner comparable to the zone parts and service manager. The district manager continually visited dealers in the District of Columbia, urging the ordering by them of promotional materials and special tools orders which, though obtained from other manufacturers, were billed to Pontiac and rebilled to the dealers at cost. The district manager solicited from dealers orders to round out their inventories of parts and accessories. He received dealers' orders, although most of them were sent directly to General Motors' parts division warehouse in Baltimore, Maryland.

The district manager assisted dealers in holding salesmen's meetings, discussed with the dealer's sales manager "business-getting methods" and "such matters as sales department organization, advertising, demonstrations, and salesmen's incentives. He advises on the reconditioning of, allowances for, and inventory of used cars. He tries to assist the dealers in maintaining proper inventories of new automobiles, neither too large nor too small." (R. 265.) Immediately before the introduction of new models, the district manager sometimes was required to urge dealers to purchase additional cars to maintain adequate stocks during the model change-over period. He informed dealers on models more salable than those in the dealers' existing stock. Monthly, he obtained from dealers within the District of Columbia, projections for the next three months of their new automobile requirements, to be used by the division for production planning purposes. From time to time, he would pick up for processing through the zone office, or-

ders for new automobiles, although most orders were sent by the dealers directly to the latter office. The zone office also maintained a small stock of automobiles which it sold directly to dealers. (R. 265-66.)

The "90-Day" projection requirements, the "10-Day" reports of sales and inventories, and the monthly financial statements of dealers were designed to aid the zone and, through consolidation, the national headquarters in Michigan, to plan production schedules for vehicles. Each dealer's financial statements were analyzed by zone business management managers and the zone manager to determine the financial condition of the dealer, and to ascertain whether weaknesses existed in his operations when compared with dealer averages. If so, the district manager discussed it with the dealer involved. More serious cases were handled by the zone manager and the business management manager. "The district manager, armed with the knowledge of dealer averages, gives the dealer advice and assistance on almost every phase of his business." (R. 267.)

Regular visits to the zone were made by the division's general manager, general sales manager, the division's assistant general sales manager and its regional manager. From time to time a department head from the sales staff in Michigan would visit the zone for the purpose of making good will calls on individual dealers and attending dealer division meetings conducted either in the District of Columbia or in Fairfax, Virginia. Of approximately ten dealer meetings a year, one or two included all dealers in the zone. They were held in the District of Columbia for the general purpose of a description by division personnel of new products, new sales promotion materials, and other matters. Annually, at an automobile show held in the District, zone personnel of the zone actively participated in organizing and setting up dealer displays, supplying to

them for this purpose automobiles which were thereafter sold to them. Zone personnel attended the show at all times to explain and describe General Motors' exhibits. (R. 267-68.)

The consequence of the activities of General Motors' employees was stipulated to be as follows:

> "(R) The assistance and advice provided to dealers, and the other activities as above described are a form of sales promotion to aid in attracting retail customers into the dealerships and in obtaining retail sales, and as a result of such retail sales, the wholesale orders from dealers to Petitioner [General Motors Corporation] flow automatically and are not ordinarily specifically solicited." (R. 268.)

Cadillac Motor Car Division operated differently than other divisions. Its products were merchandised principally through independently-owned distributors who, in turn, appointed dealers and performed functions substantially the same as those performed by the zone offices of the other car divisions. Each distributor had a "distributor selling agreement" with Cadillac and each was also a retail dealer. (R. 273.) Employees of this division, known as "district managers" and "district parts and service managers," maintained distributor and dealer contacts. The district manager for the "Washington Division", which included the District of Columbia, was located in the District of Columbia. In furtherance of his basic function to assist distributors and, through them, the dealers, in efficient operation, the district manager continually made calls on the distributors within the division. (R. 273-75.) He also consulted with the distributor concerning dealer activities, particularly relative to obtaining a share of the market; reviewed financial statements of distributors and dealers to aid them in their business operations, and participated in sales meetings. Distributors and dealers were

urged by Cadillac to have salesmen and mechanics attend General Motors' training center classes in Fairfax, Virginia. The parts and service manager, operating under the direction of the district manager, consulted with distributors and dealers on warranty claims, customer complaints, and other service matters, urging distributors and dealers to maintain adequate and current inventories of parts and accessories. (R. 276-77.)

General Motors Truck and Coach Division like the car divisions other than Cadillac operated through a system of "regions" and "zones". It appointed dealers for its products, one of which was located in the District of Columbia. (R. 277-78.) Zone personnel consisted of a zone manager, district managers, heavy duty truck managers, service representatives, a training school instructor, a zone service manager, a truck distributor with an assistant, and general office personnel. Their functions were typically the same as those of similar personnel in the car divisions and were directed to the promotion of the sale of the division's products, assisting dealers in their operations, dissemination of promotional material and promotional advice to dealers, and soliciting and promoting the sale of coach and coach parts to customers within the District of Columbia and elsewhere within the zone. As was the case with the car division, dealer meetings, conducted by the division for the purpose of familiarizing the dealer's salesmen with production information and suggestions for enhancing sales, were held in the District of Columbia and in Fairfax, Virginia. (R. 278-82.)

United Motors Service Division distributed at wholesale parts and accessories manufactured by General Motors and used in connection with its products. It dealt with wholesalers of automotive replacement parts, seventeen of whom were in the District of Columbia, under contract with General Motors. (For contract, see R. 334.) It oper-

ated through zones headed by a zone manager. A zone was in turn divided into districts headed by a district manager. In 1957 and for half of 1958, the zone office for the zone, which included the District of Columbia, was located in the District. Its purposes were to sell merchandise and, in general, to promote the sale of the division's products, and this function was carried out by the district manager and the zone merchandising representatives. (R. 294-96.) The zone service manager handled service problems with manufacturers, users, and distributors, and assisted wholesalers and retailers in settling users' complaints. He also encouraged wholesalers to send their salesmen and service personnel to General Motors' training center at Fairfax, Virginia. In addition to his general zone supervisory functions, the zone manager investigated potential new wholesalers and determined their reliability for appointment. (R. 296.)

AC Spark Plug Division manufactures automotive parts, such as spark plugs, oil filters and elements, fuel pumps, and other items, which it sells to warehouse distributors under contract with General Motors Corporation (R. 338-46), and to such national accounts as oil and tire companies which wholesale automotive replacement parts. It also manufactures defense type items. (R. 296-97.)

During the years involved, the division maintained an office within the District of Columbia staffed by a manager, a sales engineer, and two stenographers. This office maintained liaison with military and civilian agencies and with primary contractors concerned with defense materials manufactured by the division, and maintained liaison activities relating to planning by various government agencies. It advised the division of necessary engineering to be undertaken. It also informed government agencies of the capabilities of the division in respect to the manufacture of defense materials. (R. 287-88.)

In connection with the manufacture of automotive parts, (civilian sales), the division was organized into regional offices headed by a regional manager and staffed by zone managers, a fleet sales and service representative, national accounts representatives, a national account territory manager, a number of territory managers, and dealer merchandisers and clerical personnel. The zone manager, who resided in Maryland, but whose territory included the District of Columbia, trained and supervised five territory managers and five dealer merchandisers. One territory manager and one dealer merchandiser were assigned to the District of Columbia area. The zone and territory managers and dealer merchandisers spent almost all their time contacting distributors, of which in 1957 and 1958, there were six in the District of Columbia, plus two branch outlets of a Philadelphia warehouse distributor and one branch outlet of a Baltimore warehouse distributor. (R. 298, 300.)

The territory manager worked with distributors, promoted sales of the division's products, conducted sales meetings for warehouse distributor salesmen and set up displays and merchandising programs. Through personal contact he promoted the sale of the division's products to large fleet users and solicited and accepted orders from businesses such as service stations, garages and laundries, all of which used or dealt in the division's products. (R. 298-99.) Dealer merchandisers solicited and prepared orders for parts from service stations, garages, laundries, and other businesses, placing the orders with the jobber or warehouse distributor of the buyer's choice. Business calls within the District were made by the regional manager and the division's Eastern sales manager, as well as by the division's service representative, national accounts representative, and fleet sales and service representative. (R. 300.)

The Government Sales Section of General Motors Corporation's Central Office, headquartered in Detroit, obtained, received, and serviced invitations to bid on requirements of all federal government agencies for standard passenger cars and trucks. It also conducted liaison activities relating to procurement of special military vehicles for the armed services. In 1957 and 1958 the Government Sales Section maintained an office in the District of Columbia staffed by two contact men and four clerical type personnel. (R. 285.) The contact men called on procurement agencies to ascertain the agencies' plans for the purchase of vehicles, and to assure that the Detroit office was included among those to whom bid invitations were sent. Personnel contacted by the Section's employees in the District were located both within and without the District. The director of the Section spent approximately half his time in the District of Columbia discussing with government officials procurement of standard motor vehicles, contracts for which were executed by General Motors Corporation in Michigan and for the United States by General Services Administration in the District of Columbia. Armed Services contracts are executed both by the government and by General Motors in Detroit, Michigan. (R. 285-86.)

Automobiles and trucks purchased from Chevrolet for use in the District of Columbia were generally shipped from its Baltimore factory. The Cadillac Division rented to the White House and to other top level offices in the District of Columbia approximately 31 automobiles, supplying in certain cases service for the vehicles. (R. 286.)

General Motors' Allison Division, headquartered in Indiana, manufactures commercial aircraft engines, truck transmissions, heavy duty vehicles and rail cars, gas turbine engines, and defense items such as aircraft propellers and tank transmissions. In 1957 and 1958 it maintained

in the District of Columbia an office whose personnel contacted federal government and prime contractors in connection with the sales of defense materials. Three of its field engineers obtained information leading to the receipt by Allison of competitive business from the armed services or prime contractors. They also ascertained Armed Services needs so that division headquarters might study the feasibility of manufacturing needed items and assist prime contractors with development of items usable in carrying out their government contracts. (R. 289.)

In addition, personnel in the District of Columbia were involved with commercial projects, such as the sale to the Federal Aeronautics Administration of the Allison conversion of Convair airplanes and the sale of engines to commercial plane manufacturers. Division engineering personnel made regular monthly visits to the District to discuss technical details with government agencies or prime contractors, and members of the sales staff made frequent visits to discuss delivery schedules and costs of General Motors' products. (R. 290.)

The Cleveland Diesel Engine Division of General Motors, with headquarters and plant in Cleveland, Ohio, principally produces diesel engines and gas and dual fuel engines, and the like. (R. 291.) In 1957 and 1958, it maintained an office in the District of Columbia staffed by a manager who contacted various government agencies, both within and without the District of Columbia, to discuss and handle in general the division's quotations of prices to, and business with, the government, including negotiating details of contracts. After a General Motors' bid for a division product is delivered to the manager for transmittal to a government agency, he negotiates details of the contract with respect to particular clauses and works out changes in the bid, if required. He is active during the negotiation period of the contract, although after the contract has been con-

summated, he is not often further involved. (R. 291-92.)

Detroit Diesel Engine Division of General Motors, headquartered in Detroit, Michigan, manufactures diesel engines and certain items used for defense purposes. During 1957 and 1958 it maintained an office in the District of Columbia staffed by a manager and his secretary, together with a part-time consultant. This office maintained contact with various offices of the United States Government relating to the procurement of diesel engines and other division products. Its personnel in the District traveled to various government installations "looking for leads to applications for which Detroit Diesel engines may be recommended. The government requirements may originate anywhere, but most of them are 'coordinated' through the Washington headquarters of the government service involved." (R. 293.) The District of Columbia branch office attempted to have the government specify the use of Detroit Diesel engines or to draft specifications which the division could meet. Information thereon was forwarded by it to District headquarters in Detroit "to apprise it on the opportunity to sell the engines to the vehicle manufacturers." (R. 293.) It also worked in the District of Columbia with such agencies as the Bureau of Public Roads and governmental organizations involved in foreign assistance programs "to have specifications so developed that Foreign Distributors Division can bid for the use of Detroit Diesel engines, or so that a domestic vehicle manufacturer is able to meet specifications with a product which includes Detroit Diesel engines." (R. 293.)

Motors Holding Division of General Motors Corporation, headquartered in Detroit, Michigan, had its branch territory office in the District of Columbia during 1957 and 1958. It provided financing for new dealerships or those in the process of reorganization or expansion. (R. 302-03, 347-71.) If, after investigation and analysis, it was determined by

the branch manager that the applicant for financing was acceptable, and the transaction had been approved by the Division's investment committee in Detroit, the applicant received, for the 25 per cent minimum of the total capital he provided, non-voting stock in a corporation organized for the purpose. The Division provided the balance of the financing, half for voting stock and half for interest-bearing notes. During the entire time that the Division has an investment in the operation, it holds all the voting stock and nominates a majority of the directors of the business. Continuous control over the operation, and review of the soundness thereof, is exercised by Motors Holding Division.

During the period of financing, the Division's accounting supervisor periodically checks records of the business, and the branch manager, who is a director of the corporation, visits the dealership and attends directors' and stockholders' meetings. The dealer, who is subject to the control of the Division, operates the business but, pursuant to a planned formula geared to operating results, is required to buy from Motors Holding its interest in the dealership. (R. 303-04.)

During the years 1957 and 1958, four dealers in the District of Columbia were financed and controlled by Motors Holding Division. (R. 304.)

General Motors Overseas Operations Division which, during 1957 and 1958, maintained an office in the District of Columbia, contacted government agencies and foreign governments in the District of Columbia and elsewhere with respect to goods to be delivered abroad by General Motors, contracts therefor being negotiated in New York. The essential procedures of the District of Columbia office were the expediting of the Division's activities, and the obtaining of information from governmental agencies in the District and elsewhere in connection with agency regulatory activities as they affected sales of and services for equipment

shipped by General Motors outside of the United States, particularly in connection with the function of the agencies in procurement on behalf of foreign recipients of international aid. The District of Columbia office was also used as the contact office through which government agencies could expedite their orders for General Motors' products. In addition, it had a public relations function consisting of the distribution of press releases, the gathering of information, and the exchange of information with various trade associations located in the District. (R. 301-02.)

The Business Research Staff of General Motors, headquartered in Detroit, maintained during 1957 and 1958 a District of Columbia office. The Staff has as its function, economic and statistical research for the purpose of forecasting general economic conditions and their effect on products and potential product changes to be developed and manufactured by General Motors. The District of Columbia office gathered information from governmental offices in the District and elsewhere and from private agencies, and supplied to governmental agencies information they requested or required. Some contact was also maintained by it with regulatory bureaus concerned with matters affecting General Motors and with professional staffs of Congressional committees. (R. 300-01.)

General Motors Patent Section, headquartered in Detroit, maintained a branch office in the District of Columbia to which were assigned approximately fifteen men, most of whom were graduate engineers, together with five clerical personnel. The primary function of this office was to conduct in the Patent Office patent and trade-mark investigations. It also filed patent, trade-mark and copyright applications, did detailed work in connection with cases pending before the Court of Customs and Patent Appeals, the Court of Claims, and the Patent Office, and interviewed examiners in the Patent Office in connection with the allowance of claims. (R. 304-05.)

The Public Relations Staff of General Motors, also headquartered in Detroit, maintained an office in the District of Columbia to maintain contacts with, and distribute to the District of Columbia press and magazine corps and other communications media, such as radio and television, releases of General Motors and to answer questions thereon. In addition, information relating to activities of government agencies, of interest to General Motors Corporation, was obtained. The District of Columbia office was the initial contact point for visits to General Motors' plants by government personnel, local personnel, communications industries personnel, and by other persons, and contact was also maintained by the office with trade associations headquartered in the District of Columbia. The primary purpose of the public relations staff office in the District was to serve as a "listening post and for rendering service to visiting General Motors executives." (R. 305-06.)

For promoting sales of the corporation's products, General Motors' estimated expenditures for national and local advertising of all kinds, including advertising through magazines, newspapers, radio and television, having a circulation in or directed to or emanating within the District of Columbia, aggregated in the year 1957, $144,000,00.00, and in the year 1958, 137,000,000.00. (R. 283-84.)

During the course of the trial before the Tax Court, petitioner produced four economists to state their views on the propriety, from an economic standpoint, of the application to General Motors of the District's apportionment formula. Each of these economists stated that the formula to be used should consist of the factors of capital investment (property) and labor (payroll) or costs. On the matter of the inclusion of sales as a factor in the formula, one of the economists stated unequivocally that he would allow only for the factors of property and payroll, without consideration to sales. Although not subscribing to a three-factor formula which would include sales as one of the factors

(since in their view as economists income is produced only by capital and labor), petitioner's remaining witnesses were substantially in agreement that a three-factor formula which includes sales as one of the elements would not be particularly objectionable because sales, in some way or other, might reflect costs. Thus, there was disagreement among petitioner's own witnesses concerning a proper formula. (R. 39-47, 66-67, 76-77, 83-85, 93-95, 99, 102, 104.)

Three expert economists testified for the District. Contrary to the testimony of petitioner's witnesses, the District's experts were in complete agreement that the District's apportionment formula is entirely reasonable and provides an appropriate formula for the purpose of apportioning General Motors' net income. These witnesses were further of the opinion that a two-factor formula consisting of capital and labor, or a three-factor formula consisting of capital, labor, and sales, would not result in a more reasonable apportionment and, in fact, might well result in an improper apportionment for tax purposes of General Motors' income. (R. 127-31, 163-70, 189-99.)

The District of Columbia Tax Court made no findings concerning the testimony of the expert witnesses, saying that the witnesses for both parties were in error concerning a proper formula for the apportionment of income. (R. 453.)

In the year 1957, petitioner's sales to all of its customers amounted to $9,461,855,874, of which $37,185,704 derived from sales to District customers. The total net income of petitioner, subject to apportionment, amounted to $1,312,092,839. Applying to the total net income the District's apportionment formula, the net income apportioned to the District for 1957 amounted to $5,156,525, less than four-tenths of one per cent of petitioner's total net income.

In 1958, petitioner's total sales to all of its customers were $7,853,393,381, of which $32,542,519 derived from sales to District Customers. The total net income for that year,

subject to apportionment, was $653,396,893, and the amount apportioned to the District, employing the District's formula, was $2,707,677, slightly more than four-tenths of one per cent of the net income subject to apportionment. (R. 372-75.)

The Tax Court declined to sustain the District's determination of General Motors' franchise tax liability for the years 1957 and 1958, holding that the District's formula, as applied to General Motors, was not authorized by the statute. That court devised a new and different formula consisting, not of the two factors of property and payroll, for which petitioner's economists had testified, but of three factors of property, payroll, and sales, equally weighted. (R. 456-63.) On the basis of its formula, the Tax Court revised the District's assessments, ordering a refund to be made to General Motors of the difference. (R. 473.) The District appealed the decisions of the Tax Court to the United States Court of Appeals for the District of Columbia Circuit and a division of that court on February 21, 1963, affirmed the Tax Court, one judge dissenting. Thereafter, on rehearing en banc, the entire court, four judges dissenting, reversed the Tax Court, holding that the District's apportionment formula is in all respects valid and applicable to General Motors Corporation. (R. 498-532.)

Summary of Argument

The District of Columbia Income and Franchise Tax Act of 1947 expressly authorizes and directs the Commissioners of the District of Columbia to promulgate by regulation an apportionment formula for the purpose of determining what portion of the total net income of corporations, such as General Motors, is subject to District franchise tax. The legislative history of the 1947 Act, and its 1948 amendments, and the specific provisions of the Act itself,

show that Congress clearly intended that the income a corporation engaged in trade or business within the District derives from the sale of personal property to customers within the District is to be subject to franchise tax. That income has its source in the District, as well as its derivation from "trade or business" activities. The regulation of the Commissioners prescribing a formula for apportionment of the net income of taxable corporations is consistent with the statutory requirements, and with the Congressional intent.

Contrary to the contentions of General Motors, since the Commerce Clause of the Constitution does not limit the power of the Congress over the District in tax matters, that Clause cannot limit the authority of the Commissioners under the Act, particularly where, in pursuance of the requirements of the Act, the Commissioners have promulgated regulations in accord with it. Certainly, the Due Process Clause of the Fifth Amendment to the Constitution is inapplicable where, as here, the authority of the Congress to legislate for the District is unquestioned, and the validity of the taxing statute is conceded.

General Motors does not question its liability to the District for franchise taxes; it contends only that it was taxed too much. The volume of its business within the District, and the varied and extensive activities it conducts there, demonstrate that the District's apportionment formula did not ascribe to the District more of General Motors' net income than was fairly attributable to its local trade or business. Moreover, General Motors presented no evidence from which it could be determined that the District's tax was unfair, or disproportionate to the actual amount of net income which General Motors obtained through its District activities and from District sources. Nor did the Tax Court make any "factual finding" to that effect. The "findings" of that court on the impropriety of applying

the District's apportionment formula to General Motors are not findings of fact, but merely conclusions, unsupported in the record and rejected by the United States Court of Appeals for the District of Columbia Circuit.

General Motors relies upon testimony of economists to sustain its argument as to the invalidity of the District's apportionment formula. But the testimony of its economists, as well as the testimony of economists for the District, was completely disregarded by the Tax Court, which rejected the testimony on the ground, as it said, that all of the economists were in error. Even if the statements of the economists are considered, the record shows that they were in disagreement. In the absence of a clear showing by General Motors to the contrary, the validity of the District's formula remains unimpaired. Particularly is this so when General Motors made no attempt to prove what its net income from the District actually was, relying almost entirely upon the premise that a different formula would produce as to it a different tax result.

General Motors failed to sustain through competent evidence the contention it makes here that it was subjected by the District to "double taxation." Even if there was "double taxation", General Motors presented no evidence of the amount thereof. The District's tax is not to be invalidated merely because General Motors contends that, to some indeterminate degree, a portion of its income was subjected to tax by another taxing jurisdiction.

Argument

I

The District's regulation for the apportionment of net income is consistent with, if not required by, the District of Columbia Income and Franchise Tax Act of 1947.

General Motors contends at the outset that the assessments against it of District of Columbia corporation franchise taxes are contrary to the statute. It concedes, however, that the statute itself is entirely proper.[1] The proposition thus advanced by General Motors is that the Commissioners' regulation on the apportionment of the net income of a corporation, such as General Motors, produced, when applied to it, an overstatement of the net income which could be said to be "fairly attributable" to General Motors' "trade or business carried on or engaged in within the District."

The regulation under attack provides, in pertinent part:

> "(a) Where income for any taxable year is derived from the manufacture and sale or purchase and sale of tangible personal property, the portion thereof to be apportioned to the District shall be such percentage of the total of such income as the District sales made during such taxable year bear to the total sales made everywhere during such taxable year. * * * For the purpose of this regulation, the phrase 'District sales' shall mean all sales to District customers the income from which is fairly attributable to the trade or business carried on or engaged in within the District, including solicitation in the District by salesmen or other representatives of the taxpayer, that portion of sales to customers outside the District the income from which is fairly at-

[1] Petitioner's Brief pp. 12-13.

> tributable to the trade or business carried on in the District, and sales of tangible personal property the income from which is from District sources."[2]

Since the statute does not prescribe a formula for the apportionment of income and leaves this matter to the discretion of the Commissioners, the regulation which General Motors attacks can be invalid only if it is unconstitutional or is completely beyond the scope and intent of the taxing statute, producing upon its application to a taxpayer a result beyond the permissible limits which the Congress intended. Since General Motors concedes the validity of the taxing statute, the regulation is objectionable as to it only upon a clear demonstration, not that another method might or would have produced a different or more acceptable result, but that the portion of General Motors' total net income against which the statutory tax rate was applied was so disproportionate compared with the amount of that income which could be said to be "fairly attributable" to the totality of General Motor's activities in the District as to result in a tax beyond the statutory contemplation. The assertion by General Motors that the regulation effected the payment by it of a tax beyond the concept of the statute, and that the regulation is inherently improper, finds no support in the opinion of the majority of the Court of Appeals; neither does it find support in other decisions of the United States Court of Appeals for the District of Columbia Circuit which, over a period of many years, has reviewed the District's regulations on apportionment.

In the opinion on rehearing en banc it was said:

> "Having found that the single-factor sales formula employed by the District is permitted by the District

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[2] Regulations pertaining to income and franchise taxes; promulgated by the Commissioners of the District of Columbia on July 25, 1956, § 10.2-(c)(1)(a); set forth in full in the Appendix to Petitioner's Brief, p. 33a-34a.

> Code, and not shown on this record to be violative of the Constitution, we hold that the franchise tax levied against the General Motors Corporation for the years 1957 and 1958 was a valid one. * * *" (R. 527.)

This conclusion was based upon exhaustive consideration and discussion of the activities of General Motors Corporation within the District, the statute upon which the taxes were based, the regulation of the Commissioners which determined the amount of those taxes, and the relevant opinions and decisions of the appellate court and of this Court. Arguments that General Motors here advances are substantially identical with those it presented to the Court of Appeals. Because it cannot demonstrate that it was, in fact, taxed too much, and because it cannot demonstrate that the income subjected by the District to tax was, in any degree, greater than that which was "fairly attributable" to its District activities, General Motors necessarily argues the invalidity of the District's regulation on the basis of conclusionary remarks of the District of Columbia Tax Court and hypothetical extremes which even General Motors does not suggest are, in any way, applicable to it.

For many years the District of Columbia has employed for the apportionment of income, both under the District of Columbia Income Tax Act of 1939, 53 Stat. 1087, §§ 47-1501 to -1547, D.C. Code, 1961, and the District of Columbia Income and Franchise Tax Act of 1947, an apportionment formula utilizing sales where the taxpayer's business consists of manufacturing or purchasing personal property to be sold or resold. In this period of time, approximately 27 years, the District's formula has received repeated consideration by the highest court of the District. These cases have held the District's method of apportioning income for franchise tax purposes to be valid, and not to attribute to the District for tax purposes an unreasonable or improper

amount of income. *Smoot Sand and Gravel Corp.* v. *District of Columbia*, 104 U.S. App. D.C. 292, 261 F.2d 758 (1958), *cert. denied*, 359 U.S. 968 (1959); *Eastman Kodak Co.* v. *District of Columbia*, 76 U.S. App. D.C. 339, 131 F. 2d 347 (1942); *Panitz* v. *District of Columbia*, 74 U.S. App. D.C. 284, 122 F. 2d 61 (1941). In all of the foregoing cases the taxpayers raised contentions comparable to those made by General Motors that the District's formula for the apportionment of income is invalid for the reason that the products sold were produced outside the District and that the District's method of apportionment failed to take into account the taxpayer's production facilities. In *Smoot*, it was argued that decisions of this Court and the provisions of the Income and Franchise Tax Act of 1947 required the District to employ a three-factor apportionment formula based on sales, manufacturing costs and property values, a major proposition advanced by General Motors in this case. Thus, the District's formula has received detailed attention and consideration in all of its aspects; and reasons advanced by its opponents for its modification or invalidation have consistently been rejected.

General Motors says in its brief [3] that it can find no legislative history which would indicate Congressional intent supporting the theory of the statute adopted in the Commissioner's regulations. This assertion lacks foundation. The statute itself contains more than adequate authority for the use by the District of an apportionment formula based on sales.

The District of Columbia Income and Franchise Tax Act of 1947 was enacted as article I of the District of Columbia Revenue Act of 1947, 61 Stat. 331. Title VII, section 2 of that act (§ 47-1571a, D.C. Code, 1961) imposes a tax at the rate of five per centum upon the taxable income of every

[3] P. 27.

corporation whether domestic or foreign, except those exempt under the Act. The tax is expressly imposed "For the privilege of carrying on or engaging in any trade or business within the District and of receiving income from sources within the District * * *."

Title I, section 4(h) of this act (§ 47-1551c(h), D.C. Code, 1961) defines the words "trade or business" to include "engaging in or carrying on of any trade, business, profession, vocation or calling or commercial activity in the District of Columbia * * *"

Net income is defined by title III, section 1 of the act (§ 47-1557, D.C. Code, 1961) to mean the gross income of a taxpayer less certain deductions permitted under the Act. Gross income is stated in title III, section 2(a) (§ 47-1557a, D.C. Code, 1961) of the act, to include:

> "* * * income derived from any trade or business or sales or dealings in property, whether real or personal, other than capital assets as defined in this article, growing out of the ownership, or sale of, or interest in, such property; also from rent, royalties, interest, dividends, securities, or transactions of any trade or business carried on for gain or profit, or gains or profits, and income derived from any source whatever."

Title X, section 1, of the act (§ 47-1580, D.C. Code 1961) states that it is the purpose of the act to impose "(2) a franchise tax upon every corporation and unincorporated business for the privilege of carrying on or engaging in any trade or business within the District and of receiving such other income as is derived from sources within the District * * *." That section further provides that:

> "The measure of the franchise tax shall be that portion of the net income of the corporation and unin-

corporated business as is fairly attributable to any trade or business carried on or engaged in within the District and such other net income as is derived from sources within the District * * *."

Title X, section 2 of the Franchise Tax Act (§ 47-1580a, D.C. Code, 1961) provides, for District tax purposes, for apportionment of income derived by a corporation engaged in business both within and without the District of Columbia. In such cases, this section states that:

"* * * Where the net income of a corporation or unincorporated business is derived from sources both within and without the District, the portion thereof subject to tax under this article shall be determined under regulation or regulations prescribed by the Commissioners. The Assessor is authorized to employ any formula or formulas provided in any regulation or regulations prescribed by the Commissioners under this article which, in his opinion, should be applied in order to properly determine the net income of any corporation or unincorporated business subject to tax under this artiele."

By the Act of May 3, 1948, 62 Stat. 206, ch. 246, Congress amended the Income and Franchise Tax Act of 1947, to the extent that it involved the imposition of a franchise tax on corporations engaged in business within the District of Columbia. However, the amendments were restricted only to exempting or excluding from tax under the Act income derived under specific conditions from the sale of tangible personal property. Thus, by these amendments the Congress excluded from the definition of the words "trade or business" as used in title I, section 4(h) of the act:

"(1) Sales of tangible personal property whereby title to such property passes within or without the Dis-

trict, by a corporation or unincorporated business which does not physically have or maintain an office, warehouse, or other place of business in the District, and which has no officer, agent, or representative having an office or other place of business in the District, during the taxable year; or

"(2) Sales of tangible personal property by a corporation or unincorporated business which does not maintain an office or other place of business in the District and which has no office, agent, or representative in the District except for the sole purpose of doing business with the United States, but such corporations and unincorporated businesses shall be subject to the licensing provisions in title XIV of this article.

"For purposes of this proviso, the words 'agent' or 'representative' shall not include any independent broker engaged independently in regularly soliciting orders in the District for sellers and who holds himself out as such." § 47-1551c(h), D.C. Code, 1961.

In addition, the Act of May 3, 1948, added to the *exclusions* from gross income, as set forth in title III, section 2(b) of the Franchise Tax Act:

"(13) Income derived from the sale of tangible personal property to the United States by corporations and unincorporated businesses having their principal places of business located outside the District, which property is delivered from places outside the District for use outside the District: *Provided, however,* That the taxpayer shall furnish to the Assessor a statement in writing of the amount of gross sales so made and, if required by the Assessor, a list of the names of the agencies of the United States through which such property was sold." § 47-1557a(b)(13), D.C. Code, 1961.

Finally, the Act of May 3, 1948, amended title X, section I of the Franchise Tax Act (which deals with the measure of the franchise tax and with the purpose of the act) by adding a proviso which reads:

> "* * * *Provided further*, That income derived from the sale of tangible personal property by a corporation or unincorporated business not carrying on or engaging in trade or business within the District as defined in title I of this article shall not be considered *as income from sources within the District for purposes of this article, with the exception of income from sales to the United States* not excluded from gross income as provided in title III, section 2(b) of this article." (§ 47-1580, D.C. Code, 1961, italics supplied).

It is important to note that the Act of May 3, 1948, amending the District of Columbia Income and Franchise Tax Act of 1947, was confined to exclusion from District of Columbia corporation franchise tax of *income derived from sales of personal property* by corporations which, under the terms of the original act, had been taxed. The intention of the Congress in amending the Franchise Tax Act is clearly expressed in reports of the Senate and House Committees on the District of Columbia.

Senate Report No. 1042, 80th Cong., 2d Sess. (1948), stated the purpose of the bill, S. 2409, which was enacted as the Act of May 3, 1948, as follows:

> "The purpose of the bill is to clarify and *limit the imposition of a tax upon the income of corporations or businesses which is 'derived from sources within the District of Columbia.'* Due to the language appearing in the existing District of Columbia income-tax law, the imposition or assessment of the income tax was heretofore made against concerns casually engaged in

> business within the borders of the District of Columbia by such means as telephone, mail orders, traveling salesmen, and other non-consistent means of solicitation. This bill will correct such situation, and limit the imposition of an income tax to those concerns factually engaged in business on their own account or through representatives or agents within the District of Columbia." (Italics supplied.)

The report of the House Committee on the District of Columbia accompanying S. 2409(H.R. Rep. No. 1792, 80th Cong., 2d sess. (1948)), stated in part, that:

> "The purpose of the bill, as amended, is to clarify the language and intent in the District of Columbia Income and Franchise Tax Act of 1947, in order that the tax so provided be not imposed on corporations and unincorporated businesses which do not maintain places of business or representatives in the District of Columbia, or on such concerns which maintain places of business or representatives in the District for the sole purpose of doing business with the United States, in respect to sales of tangible personal property delivered outside the District for use outside the District." *Id.* p. 2.

Consideration of the original provisions of the District of Columbia Income and Franchise Tax Act of 1947, the May 3, 1948 amendments of the act, and the comments of the Committees of the Congress which considered those amendments, results in the conclusion that any regulations promulgated by the Commissioners of the District of Columbia which would have the effect of exempting from District of Columbia corporation franchise tax income derived by a corporation through sales of personal property in the District of Columbia, which is not exempt from tax by the

amendments of May 3, 1948, would be at variance with the intent of the Congress. This conclusion is required for the reasons that:

(1) All corporations engaged in carrying on any trade, business, or commercial activity in the District of Columbia, with the exception of certain organizations specifically exempt, are subject to a franchise tax for the privilege of carrying on that trade, business or commercial activity.

(2) The measure of the franchise tax to be paid by a corporation subject to tax is that portion of its net income as is fairly attributable to any trade or business carried on or engaged in within the District *and* such other net income as is derived from sources within the District.

(3) Net income, under the act, is gross income, which includes all income derived from sales or dealings in property, whether real or personal, and income derived from any trade or business or transactions of any trade or business carried on for gain or profit, or gains or profits, and income derived from any source whatever, reduced by specific deductions authorized under the act.

(4) The only exclusions from tax liability (as provided by the 1948 amendments) are the following:

(a) sales of tangible personal property by a corporation which does not physically have or maintain an office, warehouse or other place of business in the District, and which has no officer, agent, or representative having an office or other place of business in the District during the taxable year;

(b) Sales of tangible personal property by a corporation not maintaining an office or other place of business in the District except for the sole purpose of doing business for the United States;

(c) income derived from the sale of tangible personal property to the United States by corporations

having their principal places of business located outside the District, which property is delivered from places outside the District for use outside the District.

The application of the exclusionary provisions of the Franchise Tax Act, as those provisions relate to sales of tangible personal property, requires the conclusion that income from all other sales of tangible personal property to customers in the District of Columbia by a corporation engaged in a trade or business in the District of Columbia is taxable in the manner provided by the act.

In addition to the 1948 amendments, changes were made by the Act of May 27, 1949, 63 Stat. 129, ch. 146; the Act of May 18, 1954, 68 Stat. 117, ch. 218; the Act of March 31, 1956, 70 Stat. 70, ch. 154; the Act of September 4, 1957, 71 Stat. 605, Pub. L. 85-281; the Act of June 27, 1960, 74 Stat. 219, Pub. L. 86-522; and the Act of March 2, 1962, 76 Stat. 10, Pub. L. 87-408. Some of these enactments made extensive amendments, as, for example, the Acts of March 31, 1956, and of September 4, 1957. None has been directed to the apportionment of income for franchise tax purposes, nor has the Congress suggested that the District's apportionment formula is contrary to the intent and requirements of the Income and Franchise Tax Act. If the contrary were true, it can be assumed that changes in the act would have been enacted by the Congress so as to provide a method of apportionment different from that employed by the District in its regulations. *Farmers Union* v. *WDAY*, 360 U.S. 525, 532-33 (1959); *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535 (1954); *Murphy Oil Co.* v. *Burnet*, 287 U.S. 299, 307 (1932).

Contrary to General Motors' arguments, it is clearly indicated that the Commissioners' regulations are consistent with the Congressional intent, not only by an analysis of the taxing statute, but by the opinion of the United States Court

of Appeals for the District of Columbia Circuit in *Lever Bros. Co.* v. *District of Columbia*, 92 U.S. App. D.C. 147, 204 F. 2d 39 (1953), where that court, after referring to the 1948 amendments to the Income and Franchise Tax Act of 1947, said (in footnote 7):

> "* * * The second proviso quoted above ('*Provided further* * * *') is essential to the tax exemption intended to be provided for businesses selling tangible goods without use of any District office. But for it, the enterprise would be taxable on account of receiving income from District sources, even if, by virtue of the first proviso, it was not 'doing business' in the District." 92 U.S. App. D.C. at 148-49, 204 F. 2d at 40-41.

In the opinion of the Court of Appeals in the present case the validity of this proposition was recognized to the extent that it constitutes a complete answer to the argument of General Motors that the statute neither contemplates nor sanctions the use of a formula for the apportionment of its net income in the manner provided by the District's regulation. In footnote 16 the Court of Appeals said:

> "The District argues here that, regardless of whether General Motors' income from District sales is taxable under the provision applicable to corporations conducting a trade or business in the district, it is taxable as 'other income * * * derived from sources within the District.' Since the Tax Court held that the income from District sales was taxable under the 'trade or business' provision and General Motors did not appeal that finding, and since we find the income to be *fully taxable* under the 'trade or business' provision, we need not at this time pass on the scope of the 'other income' provision. However, it should be noted that this court has interpreted that provision to cover income arising

> from transactions outside the scope of a regular 'trade or business' carried on within the District, such as rents, royalties, and income from the sale of real property. *District of Columbia* v. *Evening Star Newspaper Co.*, 106 U.S. App. D. C. 360, 273 F. 2d 95 (1959); see *Lever Bros. Co.* v. *District of Columbia, supra.* The interpretation called for by the District would result in an overlap of the two provisions not called for by the taxing scheme." (R. 512; italics supplied.)

The comment of the court that, "The interpretation called for by the District would result in an overlap of the two provisions ['trade or business' and 'other income'] not called for by the taxing scheme," is not a rejection of the District's contention of the statutory concept of income to be taxed. The court merely held that the contention of the District that the taxable income of General Motors is income "fairly attributable" to its District activities which, in this case, is also taxable as "other income" derived from District sources, brings about an unnecessary overlap. The fact remains, however, that whether the income is considered "trade or business" income or "other income * * * derived from sources within the District," General Motors was subjected to tax in a manner entirely consistent with the intent of the Congress and the specific provisions of the District's statute. *Cf. Lever Bros. Co.* v. *District of Columbia, supra; Owens-Illinois Glass Co.* v. *District of Columbia,* 92 U.S. App. D. C. 15, 204F. 2d 29 (1953).

General Motors Says (Pet's Br. p. 17):

> "* * * [The District's apportionment formula] allocated to the District 100 percent of the net income derived from the segment of petitioner's business involved in the manufacture of products without the District and their sale and shipment to customers lo-

cated within the District. Clearly, a portion of such income is fairly attributable to petitioner's related out-District activities involved in the manufacture-distribution process [references omitted]."

The statute demands that the income fairly attributable to General Motors' "trade or business" in the District be subjected to a corporation franchise tax for the exercise of that privilege. The trade or business carried on or engaged in by General Motors in the District is the sale of its products to District customers, combined with numerous other activities directed to the production and sale of its products within and without the District. As was said by the Court of Appeals in *Lever Bros. Co.*, it was the intention of the Congress in the Income and Franchise Tax Act of 1947, and its 1948 amendments, to broaden the concept of source of income for District franchise tax purposes. To this end, the Commissioners' regulation recognizes the intent of Congress. Except insofar as any method of apportionment will, as this Court has recognized, produce such an incidental result, the District's formula does not, as General Motors contends, tax income which is attributable to activities of the Company outside the District.

General Motors conducts a unitary business; its activities within the District are essentially the same as those conducted by it throughout the United States. Even if the statement in its brief concerning the effect of the District's apportionment formula were correct, the District would not be taxing more of General Motors net income than the statute clearly requires. It is not the trade or business which General Motors conducts *outside* the District which the statute says is to be considered for tax purposes; it is its trade or business within the District which subjects the corporation to tax.

In *General Motors Corporation* v. *State of Washington*, 377 U.S. 436 (1964), the Court sustained a direct, unapportioned tax upon General Motors' gross receipts. General Motors' commercial activities in Washington, although in certain respects comparable with those it conducts in the District of Coulmbia, were, in the aggregate, substantially less extensive that those the Corporation conducts in the District of Columbia. Moreover, as was Washington's, the District's franchise tax is imposed for the privilege of engaging in trade or business in the District. If the State of Washington may apply against General Motors an unapportioned gross receipts' tax, irrespective of the location of General Motors' production facilities, expenditures for employees' salaries, or their relation to "economic" income, the District's tax, determined by apportionment of General Motors' net income, is no less valid. Unlike Washington's direct tax upon gross receipts, the District apportioned for application of its franchise tax only a small fraction of General Motors' total net income. Thus, out of General Motors' total net income of $1,312,092,839.15 for the year 1957, the District apportioned only $5,455,682.00 as income subject to franchise tax, and, out of a 1958 total income of $653,396,893.13, the District apportioned only $3,379,368.73 as taxable income.[4]

Under the District's formula, the apportionment was made on the basis of General Motors' *entire* net income (including all of its losses as well as its gains—both within and without the District). Neither the District nor General Motors made any attempt at any stage of the proceedings to ascertain the precise amount of net income which General Motors, in fact, derived from its District activities. In the absence of such precise determination it is clear that the

[4] R. 372-75. It was stipulated that certain errors in the information supplied by the Corporation to the District would, if the District prevailed, result in a reduction of the tax. (R. 373.)

District's apportionment could not (except by sheer coincidence) result in allocation to the District, as General Motors contends, of 100 per cent of the net income derived from the sale by the Company to District customers of products manufactured outside the District. It is clear also that the amount of income apportioned to the District in no way reflects an inclusion of income which was beyond the power of the Congress to tax, nor was it inconsistent with statutory requirements.

II

The District's formula for apportionment is consistent with principles stated by this Court governing taxation of businesses engaged in interstate commerce.

Whatever may be the limitations of the Commerce Clause of the Constitution upon the authority of a state to impose taxes upon businesses engaged in interstate commerce, the Congress, in legislating for the District of Columbia, is not bound thereby. As was said in *Neild* v. *District of Columbia*, 71 U.S. App. D.C. 306, 310, 110 F. 2d 246 (1940), involving an act of Congress imposing a gross receipts tax upon the privilege of engaging in business within the District:

> "Subject only to those prohibitions of the Constitution which act directly or by implication upon the federal government, Congress possesses full and unlimited jurisdiction to provide for the general welfare of citizens within the District of Columbia by any and every act of legislation which it may deem conducive to that end. In fact, when it legislates for the District, Congress acts as a legislature of national character, exercising complete legislative control as contrasted with the limited power of a state legislature, on the

one hand, and as contrasted with the limited sovereignty which Congress exercises within the boundaries of the states on the other. As the commerce clause operates as a limitation solely upon the states, it constitutes no bar to the action of Congress in any event. * * *

"* * * It may exercise, also, within the District, general legislative powers delegated to Congress by the Constitution; as for example the power granted by the commerce clause. When its acts by virtue of these general legislative powers it is free of the restraints which are imposed by the Constitution upon the states." (Extensive footnotes omitted.)

Neild was cited with approval by this Court in *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 601-02 (1949). General Motors recognizes the absence of any limitation upon the Congress resulting from the Commerce Clause,[5] but contends that, although Congress is not subject to a Constitutional restraint, it may not delegate its authority to local officers. It relies for this proposition upon *Stoutenberg* v. *Henning*, 129 U.S. 141. Such reliance appears to be misplaced for *Stoutenberg* did not involve a formula devised under an act of Congress for the apportionment of income for District tax purposes; it was concerned with an act of the District's legislative assembly, a body comparable in all respects to a state legislature. The enactment by the Legislative Assembly can hardly be compared to an amplifying regulation promulgated by the Commissioners pursuant to a specific pro-

[5] Pet's Br. p. 49.

vision in the Income and Franchise Tax Act of 1947 reading:

> "Where the net income of a corporation or unincorporated business is derived from sources both within and without the District the portion thereof subject to tax under this Article *shall be determined under regulation or regulations prescribed by the Commissioners.*" § 47-1580a, D.C. Code, 1961 (italics supplied).

It is a well-established principle of law that a regulation promulgated by an administrative body to implement a statute should be held invalid only where it clearly appears it is beyond the authority of those who promulgated it, or that it is inconsistent with or contravenes the statute upon which it is based. *Mitchell* v. *Budd,* 350 U.S. 473, 480 (1956) "Experts might disagree over the desirability of one formula rather than another. It is enough for us that the expert stayed within allowable limits."; *Commissioner* v. *South Texas Co.,* 333 U. S. 496, 501 (1948); *Fawcus Machine Co.* v. *United States,* 282 U.S. 375, 378 (1931).

General Motors complains that the Commissioners' regulation (although not the statute) unduly burdens interstate commerce.[6] But, if the regulation comports with the requirements of the statute relating to the imposition of District taxes, the regulation is valid. As the Court of Appeals said:

> "* * * Read as we read it, the statute clearly permits, although it does not require, the single-factor sales formula adopted by the Commissioners.
>
> "The General Motors interpretation is obviously a

[6] Pet. Br. pp 49-50.

complex and sophisticated one. We believe it more probable that the District's approach reflects the intent of Congress. A court should not apply a taxing statute more narrowly than its clear language imports unless there is some showing of Congressional intent that it should do so. * * *'" (R. 515.)

The interpretation of a statute by the highest court of a state becomes a part of the statute for the purposes of determining its validity. *Allied Stores, Inc.* v. *Bowers,* 358 U.S. 522, 526 (1959); *Wheeling Steel Corp.* v. *Glander,* 337 U.S. 562, 566 (1949). When it construes an act of Congress of local application the United States Court of Appeals for the District of Columbia Circuit occupies a position identical with that of the highest court of a state. The Court of Appeals, after an exhaustive examination of the matter, has concluded that the District's regulation comports with the District's taxing statute and that General Motors has been properly taxed in accordance therewith.

On the subject of Constitutional issues in tax cases this Court has stated:

> "* * * [W]hile it is true that we are not bound by the construction of local statutes by the local courts in deciding the Constitutional question, 'yet when we are dealing with a matter of local policy, like a system of taxation, we should be slow to depart from their judgment, if there was no real oppression or manifest wrong in the result.' *Clyde* v. *Gilchrist,* 262 U.S. 94, 97." *Atlantic Coast Line* v. *Phillips,* 332 U.S. 168, 170 (1947).

Since the Commerce Clause of the Constitution is inapplicable to the Congress when it legislates for the District of Columbia, it would seem that further reference to cases

involving impositions on interstate commerce is unnecessary, and that the cases themselves are inapposite. Nevertheless, because, in reliance on such cases, the Court is asked to resolve this case in favor of General Motors, it becomes appropriate to demonstrate that the application to the District of this Court's decisions on multi-state taxation of businesses fails completely to sustain General Motors' arguments.

International Harvester Co. v. *Evatt*, 329 U.S. 416, 422 (1947), held that:

> "* * * this Court has long realized the practical impossibility of a state's achieving a perfect apportionment of expansive, complex business activities such as those of appellant, and has declared that 'rough approximation rather than precision' is sufficient * * *. Unless a palpably disproportionate result comes from an apportionment, a result which makes it patent that the tax is levied upon interstate commerce rather than upon an intrastate privilege, this Court has not been willing to nullify honest state efforts to make apportionments. * * * A state's tax law is not to be nullified merely because the result is achieved through a formula which includes consideration of interstate and out-of-state transactions in their relation to the intrastate privilege * * *."

As was said in *Hump Hairpin Mfg. Co.* v. *Emmerson*, 258 U.S. 290, 295 (1922):

> "No formula has yet been devised by which it can be determined in all cases whether or not such a tax [affecting interstate commerce] is valid, and, applying the repeated declaration of this Court, in the cases cited and in many others, that the question is inherently

a practical one, depending for its decision on the special facts of each case, we are clear that the tax here involved falls within the accepted class described, even though the business done with residents of states other than Illinois be regarded as interstate."

As this Court stated in *Salmon* v. *State Tax Comm'n*, 278 U.S. 484, 491 (1929), where the taxpayer raised Due Process and Equal Protection of the Laws questions, "The fact that a better taxing system might be conceived does not render the law invalid."

The standard of reasonableness, rather than preciseness, which this Court has recognized as the salient factor to be considered, has been applied consistently in attacks upon state tax enactments. In each of the following cases, contentions similar to those made by General Motors were rejected and the taxes and legislation involved upheld: *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113 (1920); *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commission*, 266 U.S. 271 (1924); *International Shoe Co.* v. *Shartel*, 279 U.S. 429 (1929); *Ford Motor Co.* v. *Beauchamp*, 308 U.S. 331 (1939); *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435 (1940); *Norton Co.* v. *Department of Revenue of Illinois*, 340 U.S. 534 (1951); *United States Glue Co.* v. *Oak Creek*, 247 U.S. 321 (1918); *Butler Bros.* v. *McColgan*, 315 U.S. 501 (1942); *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959); *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292 (1944); *Railway Express Agency, Inc.* v. *Virginia*, 358 U.S. 434 (1959). Although there are many other decisions of the Court in this area the cases cited are representative of those which have sustained state taxing measures when attacked on Constitutional grounds.

In none of the cases considered by this Court has it been determined that a method for the apportionment of income for state taxing purposes was invalid per se. Neither has

it been decided that an apportionment formula such as that employed by the District of Columbia is invalid merely because other jurisdictions may employ other formulas. In fact, this Court has sustained the use of similar single-factor formulas inherently comparable to that adopted by the Commissioners of the District of Columbia. *Ford Motor Co.* v. *Beauchamp, supra, Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n, supra,* and *Underwood Typewriter Co.* v. *Chamberlain, supra.* See also *Kent-Coffey Mfg. Co.* v. *Maxwell,* 291 U.S. 642 (1934); *Norfolk & W. Ry.* v. *North Carolina,* 297 U.S. 682 (1936); *Nashville, C. & St. L. Ry.* v. *Browning,* 310 U.S. 362 (1940).

It is notable, as found by the Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary, that consistency in state apportionment formulas, each presumably equally valid, does not exist and that the District is not alone in apportioning income on the basis of a sales factor formula.[7]

General Motors couples its contentions involving the Commerce Clause with references to the due process clause of the Fifth Amendment. Pet's Br. p. 28. It cites *Wallace* v. *Hines,* 253 U.S. 66 (1920); *Miller Brothers* v. *Maryland,* 347 U.S. 340 (1954); *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450 (1959); *New York, Lake Erie & Western R.R. Co.* v. *Pennsylvania,* 153 U.S. 628 (1894); *Fargo* v. *Hart,* 193 U.S. 490 (1904), and *Hans Rees' Sons, Inc.* v. *North Carolina,* 283 U.S. 123 (1931).

Wallace v. *Hines* involved taxation of an interstate railroad by North Dakota, using a formula based on trackage. The case turned on the facts rather than the formula. *Miller Brothers* concerned the authority of Maryland to assess and collect use taxes from a company which, although

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[7] See Report of the Special Subcommittee on State Taxation of Interstate Commerce, H.R. Rep. No. 1480, 88th Cong., 2d sess., vol. 1, p. 119 (1964).

products it sold were delivered from time to time to Maryland customers, had no business outlets in the state. *Northwestern States Portland Cement Company* sustained the state's tax even though it involved a portion of the income of the company related to interstate business. As this Court said:

> "We conclude that net income from interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same." 358 U.S. at 452.

New York, Lake Erie, and Western R.R. Co. presented the question whether Pennsylvania could compel a New York Railroad company to deduct Pennsylvania's property tax from interest due Pennsylvania residents on bonds of the railroad held by such residents. The issue has no relevance to the issues here. *Fargo* v. *Hart* concerned a property tax imposed upon an express company determined on an apportionment formula based upon mileage. The vice of the formula stemmed from its application principally to real and personal property of the taxpayer permanently located outside the taxing state and not necessarily used in its actual business. The total effect of these cases is simply to prescribe a rule that a state taxing statute must not be so applied as to cause the payment of a tax unreasonable in amount and unrelated in fact to activities of the taxpayer within the taxing jurisdiction.

Under the heading "History Of Relevant Decisions" General Motors cites a number of cases which, with one exception, sustained state taxes. It refers to *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113, 120 (1920), where this Court stated:

> "[Connecticut's] tax is based upon the net profits earned within the State. That a tax measured by net profits is valid, although these profits may have been derived in part, or indeed mainly, from interstate commerce is settled."

General Motors states that the District argues, as did Underwood, that income was "attributable only to the process of sale," and that "it is of no consequence where the factory is located." (Pet's Br. p. 30.) The District makes no such assertion. Its contention is that it has fairly apportioned General Motors' net income for District franchise tax purposes consistent with the District's taxing statute and with the intent of Congress. General Motors is correct as to the District's position only to the extent that "it is of no consequence where the factory is located." The position is sound for the reason that the District is not imposing a tax based upon the location of a factory; it imposes a tax, as required by the Congress, because General Motors engages in "trade or business" within the District, derives a portion of its total net income from its operations within the District, and its net income from District sources is subject to tax. The following statement of the Court in *Underwood* appropriately describes the District's statute and the regulation of the Commissioners implementing it:

> "The legislature in attempting to put upon this business its fair share of the burden of taxation was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. It, therefore, adopted a method of apportionment which, for all that appears in this record, reached, and was meant to reach, only the profits earned within the State. * * * " 254 U.S. at 120-21.

General Motors places considerable reliance upon the frequently cited *Hans Rees' Sons, Inc.* v. *North Carolina*, 283, U.S. 123 (1931). The Court invalidated the tax because Hans Rees' average income from its North Carolina activities was approximately 17 per cent of its total income, whereas the State allocated to itself for tax purposes approximately 80 per cent of the firm's income. In discussing the effect of the North Carolina statute, the Court said at p. 135:

> "It is sufficient to say that, in any aspect of the evidence, and upon the assumption made by the state court with respect to the facts shown, the statutory method, as applied to the appellant's business for the years in question operated unreasonably and arbitrarily, in attributing to North Carolina a percentage of income out of all appropriate proportion to the business transacted by the appellant in that State. * * *"

The extreme situation admittedly present in *Hans Rees'* is completely absent here. General Motors made no attempt to show, nor did the Tax Court find, that the corporation's income from its District trade or business was less in any stated degree than that ascribed to it through use of the District's apportionment formula. There was in *Hans Rees'* direct evidence concerning the maximum income the corporation could have derived from its activities in North Carolina, a fact not present in this case. The statement by General Motors that the Court of Appeals was, under *Hans Rees'*, bound to accept the Tax Court's unfounded conclusion concerning the effect of the District's taxing formula, completely disregards the difference between the evidence in *Hans Rees'* and the evidence before the Tax Court.[8] There is certainly no comparison between

[8] See Pet.'s Br. pp. 37-38.

the apportionment for District tax purposes of approximately four-tenths of one per cent of General Motors total net income for each of the tax years, and the apportionment to North Carolina for state tax purposes of 80 percentum of Hans Rees' net income. The differences between the two cases is so complete in this regard as to make *Hans Rees'* entirely inapplicable. Aside from the percentage differences, the total absence of any proof by General Motors tending even remotely to show that it was overtaxed makes this case comparable to *Underwood Typewriter Co.* v. *Chamberlain,* 254 U.S. 113, rather than to *Hans Rees'*.

In *Underwood* the Court noted the failure to show that the Company's income subjected to tax was not reasonably attributable to its activities in Connecticut. As in *Underwood:*

> "[General Motors] has not even attempted to show this; and, for aught that appears the percentage of net profits earned in [the District] may have been much larger than [the amount attributed to the District]. There is, consequently, nothing in this record to show that the method of apportionment adopted by the [District] was inherently arbitrary, or that its application to this corporation produced an unreasonable result." 254 U.S. 121, with bracketed language added.

Underwood also furnishes an answer to the hypothetical examples used by General Motors to demonstrate invalidity of the District's apportionment formula based upon factual assumptions completely irrelevant to General Motors. (See Pet.'s Br. pp. 19-20.) Continuing in *Underwood,* the Court said:

> "We have no occasion to consider whether the rule prescribed if applied under different conditions might be obnoxious to the Constitution." 254 U.S. at 121.

If General Motors is entitled to relief, it can be only because of facts applicable to it, not because under some other circumstances the District, in order to achieve a proper apportionment of income for franchise taxes, might find it necessary to devise a different apportionment formula.

III

There is no substantial evidence that General Motors was subjected to "double taxation," and even if this were so, the District's tax is not invalidated by actions of other taxing jurisdictions.

General Motors claims that it proved that it had been subjected to "double taxation" and that the Tax Court so found. (Pet's Br. pp. 51-52.) In its original findings of fact no reference whatsoever was made by the Tax Court to the alleged "double taxation". The only statement concerning taxes is found in paragraph 3 of the findings of the Court (R. 437-38) where it was stated:

> "3. The petitioner in accordance with the statutes of the respective states filed income tax returns and paid income taxes for the taxable years involved as follows:

Year	*State*	*Amount*
1958	Delaware	$ 127,844.95
1957	Maryland	510,792.31
1958	Maryland	271,425.75
1957	Michigan	8,955,799.55
1958	Michigan	18,130,000.00"

Indeed, the Tax Court apparently considered so insubstantial or lacking in relevancy the fact of the payment by General Motors of taxes to other jurisdictions that it did not in its opinion even refer to such tax payments. (R.

438-63.) The findings relied on by General Motors were added as a consequence of a motion filed by it to amend the findings of fact and opinion. The motion (R. 474) requested that finding of fact No. 3 be amended by adding a sentence to read:

> "A portion of the income of petitioner derived from sales within the District of Columbia of goods manufactured in those states [the states listed in the original finding] was taxed by the states, pursuant to the apportionment formulas provided by their laws."

General Motors explained its desire for this additional sentence by stating in its motion:

> "With respect to the requested additional sentence, the grounds of this motion are that a finding that taxes were paid to other states becomes meaningful *only* if such taxes were based *in part* on the same income taxed in the District." (Italics supplied; R. 474.)

Although objected to on the ground that the requested sentence was unsuported by the record, and in any event that there was "no proof that the taxes were properly computed, were required to be paid, or were based in part on the same income as was taxed by the District" (R. 480) the Tax Court, with minor modifications, agreed to its inclusion. (R. 495.) The reason for its action, said the court, was that "the statement that a portion of the income from the sales here involved was taxed by other states under formulas provided by their laws is supported by documentary evidence herein." Although not identified by the Court, General Motors, in its motion, relied upon the following:

"The requested finding is supported by Exhibits 9, 12, 15, 18, and 19 (tax returns) and by the statutes of which the court took judicial notice (R. 88-89, 93, 98, Ex. 8)." (R. 474.)

There is ample reference in the record to the tax returns and to the basis upon which they were received in evidence. General Motors introduced in evidence copies of the corporation's income tax returns filed by it with the States of Maryland and Michigan for the year 1957 and with the States of Delaware, Maryland, and Michigan for the year 1958, together with canceled checks representing payment of taxes to Maryland and Michigan for the years 1957 and 1958 and to Delaware for the year 1958. (R. 14-19). In connection with the introduction of the tax returns and the payment of the taxes the Tax Court stated that the accuracy of the material contained in the returns was not assumed, that they were accepted merely for the purpose of showing that taxes based on income were paid to several taxing jurisdictions, but that they were not to be taken as proof of the facts alleged therein.[9]

No attempt was made by General Motors to establish through cogent evidence the fact of "double taxation" for which it contends here, and it introduced no facts concerning the nature or correctness of the items reflected on its returns, or the connection of those amounts to amounts involved in the computation of the District's tax. (R. 20-23.)

Despite the failure of General Motors to do anything more than to produce the tax returns filed by it with three states out of a total of 29 in which it said it was engaged in business and subject to state income taxes (R. 258), it

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[9] See discussion between court and counsel. (R. 14, 23-24.)

deduces that the District of Columbia, but not any other taxing jurisdiction, over-taxed it. Reduced to its simplest terms, General Motors says that the formulas for income apportionment used by Maryland, Michigan, and Delaware are legally permissible formulas; that they were applied to it, and that, having paid taxes thereunder based on items in a formula which, it says, but did not prove, were properly reported by it on its tax returns, the District was prohibited from proceeding under its laws to apportion General Motors' income in a manner which, in the abstract, might overlap the taxation of its income by other jurisdictions.

Although General Motors attacks the statement of the Court of Appeals that the Company failed to prove "double taxation," the fact is that the Court of Appeals was correct. The Tax Court's findings, upon which General Motors almost completely relies, made no attempt to state any specific amount of the net income claimed to be doubly taxed. That court said only that some unidentified portion of General Motors' net income was taxed by Maryland, Michigan, and Delaware. Even if the Tax Court was correct, the amount of "double taxation" was not ascertained.[10]

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[10] It was stated by a witness for General Motors that the Company has business establishments in 38 states and the District of Columbia. (R. 2.) Reference to 29 of those states imposing income taxes was submitted by General Motors. (Pet's. Ex. 22; R. 258-60, 398). The remaining 9 states are not identified, although undoubtedly taxes of some kind were paid by General Motors to those jurisdictions. It is inconceivable that all of these taxing jurisdictions, with the exception of the District of Columbia, so applied their tax laws as to avoid the abstraction of "double taxation," leaving the District as the sole jurisdiction which, to some unstated amount, has subjected the Corporation to double taxation. This Court has never held that a state may not take into account for tax purposes activities or items which legitimately may also be considered by another state in the application of its taxing measures. This is precisely what General Motors requests the Court to do.

General Motors necessarily errs in relying (Pet's Br. p. 53) upon the statement of the Tax Court that the District's apportionment formula attributed to the District 100 per centum of the net income derived by petitioner from that segment of its business consisting of the manufacture without, and the sale of products within, the District.

There is no evidence whatsoever concerning the actual amount of net income obtained by General Motors from its District activities. Since the Tax Court found that the District taxed 100 per centum of the Corporation's net income from the manufacture of products without and their sale within the District, it follows that the Tax Court premised its conclusion upon the hypothesis that General Motors' operations in the District were profitable. There is no evidence, however, that General Motors had equally profitable activities in each of the other jurisdictions in which it operates. Since the District apportioned General Motors' total net income, which necessarily had been computed by including all transactions whether profitable or not, or resulting in a loss, the amount of the net income apportioned to the District could well be below the actual net income General Motors obtained from District operations. The entire matter is thus based upon speculative reasoning for, without definitive facts, the reasoning cannot be objective.

In progression, by the method espoused by General Motors, it could be argued that every taxing jurisdiction has in some degree taxed income which was not the result of the activities of General Motors in the taxing jurisdiction, and particularly would this be true in the case of a state which imposed a tax against General Motors even though General Motors had sustained in that state a loss. *Cf. Butler Bros* v. *McColgan*, 315 U.S. 501 (1942).

IV

General Motors has not demonstrated, nor can it, that the franchise taxes imposed by the District of Columbia were excessive.

Relying on statements of the Tax Court which can be best described as pronouncements, rather than findings, and which are unsupported by the evidence presented, General Motors argues that the District's regulatory apportionment formula produced as to it an unreasonable result.[11] In *Boske* v. *Comingore*, 177 U.S. 459, 470 (1900), this Court stated the rule to be applied in the case of regulations promulgated pursuant to statutory authority:

> "* * * In determining whether the regulations promulgated by [the Secretary of the Treasury] are consistent with law, we must apply the rule of decision which controls when an act of Congress is assailed as not being within the powers conferred upon it by the Constitution; that is to say, a regulation adopted under section 161 of the Revised Statutes should not be disregarded or annulled unless, in the judgment of the court, it is plainly and palpably inconsistent with law. Those who insist that such a regulation is invalid must make its invalidity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress."

The Tax Court, in making its initial findings of fact, adopted in their entirety the facts stipulated by the parties. (R. 437.) It added minor references to the locations of General Motors' business establishments and man-

[11] Pet.'s Br. pp. 35-45.

ufacturing activities, and a reference to the filing by General Motors of income tax returns and payment of income taxes to the states of Delaware, Maryland, and Michigan. (R. 437-38.) It is significant that no characterization of the District's formula appeared in the findings of fact until *after* the court had concluded that it would not apply the District's apportionment formula, but would resolve the case upon a formula it created consisting of the factors of property, payroll, and sales, equally weighted. (R. 456, 459.) The reason which the Court used for its rejection of the District's formula and the creation for purposes of this case of a multi-factor formula was that "* * * the Court does not believe that a one factor formula of sales can, consistent with the Act, be used where, as here, the trade or business involved is the manufacture of tangible personal property without, and the sale thereof within the District." (R. 447.)

As a review of the statute and of the cases considered by the United States Court of Appeals shows, the action of the Tax Court was novel and at variance with prior decisions of the Court of Appeals.

Following the Tax Court's initial findings of fact, General Motors, presumably for the purpose of strengthening the findings, as well as the Tax Court's opinion, moved the Court to make certain amendments to the findings and opinion. (R. 474-79.) Among the findings requested by General Motors were the following:

> "5. The segment of petitioner's business that is conducted both within and without the District of Columbia involves the manufacture of a certain number of automobiles and kindred products wholly without the District and the sale thereof to customers within the District. The net income from this segment of petitioner's business is earned by and is fairly attributable

to both its manufacturing and selling activities, and such net income is earned in part by the manufacture outside the District of the articles sold to customers within the District. While such net income is not *realized* until sale, it is *earned* in part by the manufacture of the article sold.

"6. The method used by respondent attributed to the District 100% of the net income derived by petitioner from that segment of its business which consisted of the manufacture and sale of the products which were sold to customers in the District, which percentage is out of all appropriate proportion to the business carried on or engaged in by petitioner within the District." (R. 474-75).

Despite strong objection (R. 479) in which it was pointed out that, with the exception of the first sentence of proposed paragraph 5, "the remainder of the proposed findings is directed not to facts, but to conclusions of law", the Tax Court adopted almost without change General Motors' requested findings. (R. 480, 495-96.)

Primarily, therefore, the contentions of General Motors in this case are based upon its *own* statements concerning the District's apportionment formula. Despite the acceptance of these statements by the Tax Court, they represent conclusions, unsupported in the record, and unsupported in the findings of fact. As General Motors recognizes in its brief[12] the statements of the Tax Court which General Motors prompted, and upon which it so heavily relies, were rejected by the Court of Appeals. That court described finding No. 6 of the Tax Court to be based, not upon fact, but solely upon a conclusion of the Tax Court concerning the nature of the District's taxing statute. (R. 517.)

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[12] Pet's Br. p. 37.

Support for General Motors' contention, as set forth in its brief,[18] that it has unreasonably been taxed consists of a quotation of the Tax Court "findings", references to the nature of General Motors' business and to the amounts of its property and payroll, and mention of the testimony of economists who testified on its behalf.

Of course, the burden of showing that the District's determination of General Motors' liability was improper was upon petitioner. It did not carry this burden simply by showing that it manufactured outside the District, products sold within and without the District, nor by establishing its payroll costs and book values of its real and personal property. With the exception of the admitted fact that General Motors conducts manufacturing activities outside the District, the description of General Motors' activities within the District, including organizational control principally in Michigan, was stated in the stipulation between the parties to be as follows:

> "Petitioner's methods of doing business and selling and distributing it products as described [in the stipulation] are the same throughout the country." (R. 261.)

Unless the fact of manufacturing is of such importance as to require that any formula for the apportionment of General Motors' income must include factors which will, in some manner, weigh manufacturing, the District's formula for apportionment of income, based as it is upon General Motors' "trade or business" in the District, is not subject to rejection simply because another formula, permissive in nature, would produce for General Motors a different tax result.

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[18] Pet's Br. pp. 35-45.

General Motors says that expert testimony presented by it before the Tax Court showed the unreasonable and arbitrary character of the District's formula. (Pet's Br. p. 58) The Tax Court made no finding concerning the testimony of the experts who appeared either on behalf of General Motors Corporation or on behalf of the District of Columbia. In fact, noting that these witnesses were diametrically opposed, the Tax Court said: "Both sets of witnesses were in error." (R. 453.) Interestingly enough, the Tax Court commented that the statements of expert witnesses for General Motors who, in the Court's words, said "that the assessment in this case resulted in attributing to the District a percentage of income out of all proportion to business transacted by them there," (R. 453-454) were immaterial in view of *Smoot Sand & Gravel Co., supra,* a case which the Tax Court had decided in favor of the District and which was affirmed by the Court of Appeals.[14]

The witnesses for General Motors were not themselves in agreement concerning the proper method of apportioning General Motors' income for District tax purposes. Professor Studenski said unequivocally that sales should not be included in an apportionment formula which, he stated, should consist only of property and payrolls. The remaining three economists believed that the formula should consist of payrolls and property, but that the inclusion of sales as a factor would not be objectionable because, they said, sales might, in some manner, reflect costs not represented in property and payrolls. (R. 30, 40, 42-44, 47, 66-67, 76-77, 83-85, 92, 95, 99, 102, 104, 212, 226,

[14] In view of this statement by the Tax Court it is not entirely clear why the Tax Court later amended its findings to include language which it had said was immaterial, particularly in view of the fact that it had rejected the testimony of all the witnesses as being incorrect and had noted that the expert witnesses for the District of Columbia were opposed to the expert witnesses for General Motors.

227, 229-31.) Professor Paton contended that income is represented entirely by costs and that there is no other available process for determining income. But, he said, a formula consisting of payrolls and property "would make a pretty good rule of thumb. It is not ideal but payroll does describe the personal situation, personal service." (R. 26-29, 39.)

Professor Morton admitted that sales were as necessary as land, labor, capital, and enterprise, and that neither expenses nor property creates income. He also denied that sales would create income. (R. 212, 223, 237.) Testifying as to the manner in which he would determine "income" based upon the application of labor, capital, and enterprise, Professor Morton stated that the sale of the item produced is probably the best way to measure the total value of the output and that this measure is the one most commonly used. As he said, inherent in the price of the product sold, when considered in respect of realistic income, are all the items of land, labor, capital, and enterprise to which he referred as "costs". He doubted whether any practical formula could be devised which would take into account all of the variations and contributions inherent in the production of income. (R. 239, 253.)

Expert economists testifying for the District disagreed completely with the witnesses for General Motors. Dean Bailey, Professor Watson, and Mr. Robert Nathan each denied that the District's formula was unreasonable and unfair. (R. 127-30, 163-65, 189-92.) None of these witnesses was of the opinion that a formula consisting of property and payroll, or property, payroll, and sales would produce a better apportionment of General Motors' net income fairly attributable to its business activities in the District than the District's formula (R. 130-31, 168, 192-99.) Professor Watson stated that the District formula achieves the best apportionment available. (R. 163-67.) Dean Bailey testi-

fied that income did not arise from capital. As he said, it arose in the case of General Motors from sales, even though manufacturing activities made possible the products sold. (R. 139-43, 147-49, 155.) Mr. Nathan gave as his opinion, from a practical standpoint, that it was impossible to arrive at a "conglomerate aggregate" formula which would take into consideration all of the elements which influence and determine the level of profits or profitability. (R. 189, 192.) On the matter of uniformity, he commented that the District's formula, uniformly applied throughout all taxing jurisdictions, would produce uniform results. (R. 193.) It was his opinion that although any formula has elements of arbitrariness, a tripartite formula could contain elements of arbitrariness, in many ways just as arbitrary, if not more so, than the District's formula. (R. 192.) As he said, a formula consisting of labor, capital, and sales is merely a summation of the deficiencies of each of the factors. (R. 195, 197.) Queried on the matter of arbitrariness in the District's formula, Mr. Nathan said:

> "* * * I think I could develop illustrations frankly which would appear to be just as arbitrary in their application from many other formulas from this one, and in view thereof and the simplicity of it I think that even though there may be extremes where it would not appear to be applicable I still think it is the best." (R. 202.)

Summarized, the testimony of the District's economists was that the District's apportionment formula is fair and reasonable and consistent with sound economic theory; that it achieved a proper apportionment of General Motors' net income; and that a multi-factor formula would not produce a more reasonable result.

The selection by General Motors of the testimony of its

economists, which was contradicted by the District's economist, and which was not accepted by the Tax Court, demonstrates only the arguments which may arise in connection with the use of any formula and the arguments which may be presented concerning the elements such a formula should contain.

The Tax Court itself recognized the limitations inherent in the formula it devised and the formula for which General Motors contends. As it said in its memorandum of February 27, 1962, which followed its original findings of fact and opinion:

> "No formula can accurately apportion net income in circumstances present in this case. At best it can only be an approximation. Taxation, as has often been said, is not an exact science. While the three factor formula is generally recognized as appropriate under the circumstances like those herein, there are several schools of thought in relation to the content and delineation of the factors. For instance, some administrators and experts contend that the factor of property should represent the present actual value. Some believe rented property should be included, while others it should be excluded. As to payroll, there is one school which holds that the place wherein the compensation is paid, while others claim that the place where the services are performed is the locale. There is even more disagreement on sales. Among others, is whether the situs should be determined by 'origin' or by 'destination.' * * *." (R. 493.)

Recognition of this problem appears in the Opinion of the Court of Appeals where it was said in footnote 20 (R. 514):

"* * * It is not at all clear that the three factor formula is even a close approximation of the kind of economic breakdown called for. While there is some relationship between the cost of payroll and property attributable to a certain stage and the income arising from that stage, it is not at all certain what that relationship is. Moreover, the sales process, being the end product of all the other stages and responsible for the actual receipt of the *money* income, could be said to be the most important stage, thus permitting a greater proportionate share of the income to be assigned to it vis-a-vis the other steps in the process."

The total amounts of General Motors payrolls and properties, both within the District and everywhere, were stipulated by the parties. (R. 385-88.) The stipulation was, however, subject to the following stated conditions:

"11. It is further understood and agreed that the dollar amounts set forth in Paragraphs 9 and 10 of this Supplemental Stipulation are included herein at Petitioner's request in order that strict and formal proof of said dollar amounts shall not be required, and Respondent has agreed to their inclusion solely for the purpose of reducing the time required for the trial of these cases. Respondent, by so agreeing, does not, however, stipulate or concede that these amounts or the basis upon which they are predicated are pertinent, material, relevant, or that they may be admitted into evidence, and Respondent specifically reserves the right to object to the admission of said Paragraphs 9 and 10." (R. 388.)

Although the manner in which payroll and property amounts were determined was stated in the stipulation,

without, however, the acceptance by the District of their validity for this case, no attempt was made by General Motors to show the relative contribution of any of its properties to its net income, nor the relative contributions which the payment of salaries and wages to employees made to the production of income. Admittedly, the accomplishment of such a matter would probably have been impossible, but the fact remains that the items of property and payroll have no specific signficance unless it is assumed, as General Motors argues it should be assumed, that the failure to include these items, equally weighted, in a formula causes an invalid apportionment of the corporation's net income for tax purposes. Even if a formula consisting of the factors of property, payrolls, and sales were used for the apportionment of General Motors' income, it does not follow that such an apportionment would achieve a better determination of its income from District sources than was obtained by use of the District's formula.

General Motors, again finding support in the views of its economists, which the Tax Court declined to accept, presents in its brief computations it made concerning the percentages which its payrolls and property bore to General Motors' total net income. But the percentages demonstrate only what any such mathematical computation could achieve, a product. (See Pet's Br. p. 43.) The comparative computations used by General Motors do not establish its income from its trade or business in the District, any more than would a percentage based upon the total number of General Motors' employees in the District to its total net income.

Conclusion

The Court of Appeals, in its opinion sustaining the assessment by the District against General Motors of corporation franchise taxes, fully considered and properly rejected contentions of General Motors substantially identical with those it now presents. The judgment of the Court of Appeals should, in all respects, be affirmed, with costs assessed against General Motors.

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